UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FILED
DEC 04 2015
CLERK, U.S. DISTRICT CLERK
WESTERN DISTRICT OF TEXAS
BY
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UNITED STATES OF AMERICA §
ex rel. Nevarez Law Firm, P.C., §
NEVAREZ LAW FIRM, P.C., §
§
Plaintiff, §
§
v. § **Civ. No. EP:15-cv-0297-DB *SEALED***
§
DONA ANA TITLE COMPANY, et al., § **FILED UNDER SEAL**
§ **AND IN CAMERA**
Defendants. §

EX PARTE MEMORANDUM IN SUPPORT OF UNITED STATES' FIRST APPLICATION FOR EXTENSION OF TIME TO INTERVENE

This is a qui tam action in which the relator, the Nevarez Law Firm, P.C. ("relator"), has filed a 320-page Complaint for the United States alleging that the defendants engaged in a fraudulent real estate transaction involving property located in New Mexico. By law, the United States has 60 days to decide whether to intervene in and assume control of this action. The current deadline to intervene expires, at the earliest, on December 7, 2015. This deadline may be extended for good cause.

Several of the defendants in this action are under criminal investigation by the El Paso U.S. Attorney's Office and Federal Bureau of Investigation for mortgage fraud and related offenses. The criminal investigation is both broader and may encompass more transactions and parties than this qui tam action. Although the investigation is in its early stages, the FBI may pursue covert measures and operations. At this time, an overt civil inquiry into the relator's claims would likely jeopardize the FBI's ability to develop and execute a plan to investigate the alleged fraud. At present, the criminal team cannot estimate how long it will take to complete the covert phase of its investigation.[1]

The United States respectfully requests a three-month extension of the intervention deadline so that the criminal investigation can proceed without the disruption of civil investigation, litigation, and discovery. Once the three-month period is over, the United States should be in a better position to determine how to proceed, whether by requesting a stay of this civil action in deference to ongoing law enforcement operations, or seeking a further extension of the seal to allow for parallel civil and criminal inquiries.

The United States is mindful of the Court's docket and preference for prompt disposition of civil cases. The government respectfully submits that, in this instance, the public interest in allowing law enforcement to proceed unhindered outweighs the civil pecuniary interests raised in this qui tam action. See Cambpell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962).

For these reasons, the United States respectfully requests an initial three-month extension of the deadline to intervene, from December 7, 2017 to March 7, 2016. The complaint should remain under seal while the United States investigates. Relator consents to a three-month extension of the intervention deadline and seal.

DISCUSSION

A. The False Claims Act

The qui tam provision of the False Claims Act allows a private person – called a relator – to bring a civil lawsuit on behalf of the United States. 31 U.S.C. § 3730(b). A relator's complaint "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." Id. § 3730(b)(2). A relator must immediately serve the complaint on the United States, along with a written disclosure of substantially all the material evidence and information in her possession. Id. The United States "may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information." Id. This 60-day intervention period may be extended for good cause. Id. §3730(b)(3). The intervention period is intended to give the United States an opportunity to evaluate the relator's allegations, investigate the facts, and determine whether the government should intervene and prosecute the action against the defendant. Id. § 3730(a)-(c).

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[1] Assistant United States Attorney Debra Kanof and FBI Special Agent James Griego are leading the criminal investigation. If the Court desires additional information about the criminal investigation, the United States will arrange for AUSA Kanof or Agent Griego to make an ex parte presentation to the Court in accordance with 31 U.S.C. § 3730(b)(3).

A qui action must be filed in camera, where it remains under seal until the Court lifts the seal and orders the complaint to be served on the defendant. Id. § 3730(b)(2). The purpose of the seal is to protect the government's ability to investigate the alleged fraud. See American Civil Liberties Union v. Holder, 652 F. Supp. 2d 654, 664 (E.D. Va. 2009), aff'd, 673 F.3d 245 (4th Cir. 2011). The seal prevents premature disclosure of information that might expose pending law enforcement operations and gives the government "an adequate opportunity to fully evaluate the [relator's] private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action." S. Rep. 99-345, at 23-24 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5288-90, 1986 WL 31937 (1986).

B. Good Cause Exists for a Three-Month Extension of the Intervention Period

This case involves allegations that the defendants orchestrated a real estate swindle involving a property located in Santa Teresa, New Mexico. The relator, an attorney who formerly represented the victims of the alleged fraud, contends that defendants engaged in fraudulent conduct here in the Western District of Texas. He suggests that the United States has been damaged because the defendants' false statements caused the United States to insure a loan that should not have been issued. (Dkt. #1 at 285 ¶ 291 to 311 ¶ 378.) Relator asserts claims under the False Claims Act, 31 U.S.C. §§ 3729 to 3733, as well as a litany of other statutes and causes of action, including civil RICO.[2]

Relator filed his Complaint on October 7, 2015, and served the United States Attorney's Office that same day. (Dkt. #1.) Thus, the statutory 60-day deadline for the government to elect whether to intervene expires on December 7, 2015, at the earliest. Because the United States filed this request before the intervention period ended, the request is timely under Rule CV-7(d).

The allegations set forth in relator's Complaint are under review by the Criminal Division and the FBI in El Paso. The criminal investigation is not, however, bound by the relator's pleading. That investigation is broader than the relator's allegations and may encompass different parties, transactions, properties and offenses.

The United States seeks a three-month extension to accommodate the criminal investigation. Once the extension period has ended, the government should be in a better position to report on several issues, including whether this civil case should be stayed in deference to ongoing law enforcement operations or whether the investigation of the relator's claims can proceed; how long we anticipate it will take to investigate the relator's claims; and the investigative progress that has been made to that point.

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[2]Although we seek a three-month extension to accommodate the criminal investigation, the Civil Division has (1) contacted the Department of Housing and Urban Development to determine whether, in fact, the United States has incurred any liability on the loan at issue, (2) begun evaluating the source of the allegations in the qui tam action and the relator's standing to file the suit, and (3) started evaluating the causes of action the relator has asserted to determine whether they can be pursued in tandem with claims under the False Claims Act. The United States will continue to pursue these issues internally during the requested extension period.

The public interest weighs in favor of prioritizing the criminal investigation over this civil action. As the Fifth Circuit has observed:

> There is a clearcut distinction between private interests in civil litigation and the public interest in a criminal prosecution, between a civil trial and a criminal trial, and between the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. . . The very fact that there is clear distinction between civil and criminal actions requires a government policy determination of priority: which case should be tried first. Administrative policy gives priority to the public interest in law enforcement. This seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities.

Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962). Although prompt adjudication of this civil action is also in the public interest, policy still weighs in favor of allowing the criminal investigation to take priority. This is especially true where, as here, the criminal inquiry may lead to other subjects or targets beyond the defendants in the qui tam complaint.

C. This Case Should Remain Under Seal While the Government Investigates

Generally speaking, a qui tam suit remains under seal while the government conducts its investigation. United States v. Bon Secours Cottage Health Servs., 665 F. Supp. 2d 782, 784 (E.D. Mich. 2008). The seal in this case should remain in place to ensure that the government's criminal investigation is not compromised. Extending the seal will enhance the government's ability to investigate and make an informed decision about how to proceed. "Such a pre-suit investigation is particularly critical before alleging fraud." American Civil Liberties Union v. Holder, 673 F.3d 245, 253 (4th Cir. 2011).

CONCLUSION

The public interest favors an extension so that the United States can evaluate this case criminally and make fully informed decisions about how to proceed. Although we anticipate that an extension will give the United States an opportunity to make some progress, the government's investigation is likely to take more time to complete. The United States should be in a better position, at the end of the three-month period, to advise the Court about how it intends to move forward. Should the determination be made to seek a stay of this action in deference to ongoing law enforcement operations, we will promptly notify the court and file an appropriate application. In the interim, if the Court desires additional information about this case or the criminal investigation, the United States stands ready to provide such information in camera in accordance with the False Claims Act, 31 U.S.C. § 3730(b)(3).

Date: December 3, 2015

Respectfully submitted,

RICHARD L. DURBIN, JR.
United States Attorney

By:

JOHN J. LoCURTO
Assistant United States Attorney
Texas Bar No. 24073750
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216
Tel: (210) 384-7362
Fax: (210) 384-7322
Email: john.locurto@usdoj.gov

Attorneys for the United States of America